No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1979

HARVEY RAY HATCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 423 F. 2d 1086.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1970. A petition for rehearing was denied

on April 16, 1970. On May 15, 1970 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in refusing to grant petitioner's request for a severance.

2. Whether evidence concerning other alleged counterfeit coins which were not the subject of the two count indictment should have been excluded.

STATEMENT

An indictment filed on March 21, 1968 in the United States District Court for the Northern District of Texas charged petitioner with uttering a counterfeit 1916-D ten cent coin on February 5, 1965 (Count I), and with uttering 48 counterfeit 1931-S one cent coins in July 1967 (Count II), both offenses in violation of 18 U.S.C. 486. After a jury trial, petitioner was convicted on Count II. The jury was unable to reach a verdict on Count I. Petitioner was sentenced on June 4, 1969 to imprisonment for 18 months. The Court of Appeals affirmed (Pet. App. 1-8).

The evidence relating to Count I showed that on February 5, 1965, petitioner pawned a 1916-D ten cent coin for $250 at a shop owned by one Oscar Utay (Tr. 73-75). Mr. Utay testified that petitioner had represented that the coin was genuine (Tr. 74-75). As a safeguard, Mr. Utay had sent the coin to another coin dealer for examination, who had also concluded

that the coin appeared to be genuine (Tr. 75). An expert witness from the Bureau of the Mint testified that in his opinion the dime was counterfeit (Tr. 192-193).

The evidence relating to Count II was primarily elicited from Nathan Shay who first met petitioner in Houston in 1962 when Shay worked for the ABC Coin Shop (Tr. 96, 99). At that time, petitioner, a salesman for certain meat products, was negotiating a sale with Shay and the subject of coins was discussed only incidentally (Tr. 99).

In 1967, petitioner and Shay met accidentally outside a coin shop in Dallas (Tr. 99-100). After informing Shay that he owned several coins which he wanted to sell, petitioner suggested that Shay might be interested in selling some 1950 and 1939-D nickels for him (Tr. 100, 102-103). Subsequently, petitioner contacted Shay and asked him to meet him at a local restaurant to discuss further possible coin transactions (Tr. 103). At the meeting, petitioner gave Shay a roll of 1931-S pennies which he wanted sold for $800 and also asked Shay if he could sell rolls of 1939-D nickels (Tr. 104-105). The following day, petitioner gave Shay 10 rolls of 1939-D nickels to sell (Tr. 109-110), telling him that they belonged to someone in his family (Tr. 111). Shay was unsuccessful in his attempt to sell the nickels to various coin dealers (Tr. 112-115).

Shortly thereafter, Shay learned that agents of the Secret Service wanted to see him. Upon contacting them, he was told that the nickels he had been trying to sell were counterfeit. Shay agreed to continue his

dealings with petitioner and to report his activities to the agents (Tr. 124, 126, 135). On instructions from the agents, Shay returned the nickels to petitioner stating that he had been told that they were counterfeit (Tr. 116-117). Petitioner replied that he was uncertain as to the genuineness of the nickels (Tr. 117).

Shay did not return the pennies, but continued to make efforts to sell them (Tr. 119-121, 140). During this period, petitioner and Shay engaged in several telephone conversations regarding the pennies, during which petitioner admitted that the pennies were not genuine (Tr. 149-164); he disclosed that the pennies and nickels were made in Germany. Petitioner also asserted that he needed money so that he could go to Mexico to procure more coins (Tr. 121-124).

With Shay's permission, Gary L. Wistrand, a Secret Service agent, listened in on a telephone conversation on August 1, 1967 between petitioner and Shay, during which he heard petitioner start to say the word "counterfeit", pause and resume with "1931-S pennies" (Tr. 172-174). At a later date, Shay paid petitioner $800 for the pennies with money supplied from the Secret Service (Tr. 127).

An expert witness from the Bureau of the Mint expressed the opinion that the 1931-S pennies were counterfeit (Tr. 187-190).

ARGUMENT

1. The trial court acted within its discretion in refusing to grant petitioner's request for a severance

of trial on the two counts of the indictment. The charges were of a similar nature and thus within the joinder provisions of Rule 8(a), F.R.Cr.P and no prejudice accrued warranting relief under Rule 14, F.R.Cr.P. The opinion of the court of appeals discusses and properly rejects the claim of prejudicial joinder and we rely upon that discussion here (Pet. App. 4-7).

2. Petitioner also argues that testimony, elicited from Shay and petitioner himself, concerning the 1939-D nickels which were not covered by the two-count indictment, should have been excluded. As the transactions involving the alleged counterfeit nickels were inextricably tied to the transfer of the counterfeit pennies, testimony concerning the nickels was properly admitted on the issues of intent and knowledge. See *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *United States* v. *Chapman*, 413 F. 2d 440 (C.A. 5), certiorari denied, 396 U.S. 903; *United States* v. *Cobb*, 397 F. 2d 416 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Knohl*, 379 F. 2d 427 (C.A. 2), certiorari denied, 389 U.S. 973. Moreover, the trial judge protected petitioner's interests by carefully charging the jury on the limited purpose for which the evidence regarding the nickels was admitted (Tr. 239-240). There is no reason to suppose that the jury failed to follow these instructions. See *Frazier* v. *Cupp*, 394 U.S. 731, 735-736.[1]

[1] Petitioner's further claim that government counsel in cross-examination prejudiced him by "continually" referring to his silence from the time of arrest to the time of trial

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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JULY 1970.

(Pet. 6) is without merit. An examination of the cross-examination reveals that government counsel was not commenting on petitioner's right of silence but seeking to test his claim made on direct examination that petitioner did not know that the pennies were counterfeit (Tr. 222-223). No objection regarding this line of cross-examination was made at trial nor was any clarifying instruction sought. Moreover, no issue in this connection was raised in the court of appeals. There is no reason for this Court to consider this newly raised issue at this juncture.

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